Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF

FOX ENTERTAINMENT GROUP, INC. and FOX TELEVISION STATIONS, INC.

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SUMMARY

In overturning aspects of the Commission's *1998 Biennial Review Report* and in reversing the local television multiple ownership rule, the D.C. Circuit faulted the Commission for failing to provide evidence to justify its ownership rules. Acknowledging this "evidentiary gap," the Commission in the *Notice* strongly encouraged commenters to provide empirical evidence to buttress their contentions.

In addition, the FCC commissioned a number of studies (the "*Ownership Studies*") intended to inform the 2002 Biennial Review. Not surprisingly, given the dramatic changes in the media marketplace that have occurred since adoption of the Commission's media ownership rules, these studies provide strong support for deregulation. Taken together, the studies demonstrate that the media marketplace is vigorously competitive, exhibiting no signs of harmful concentration, and that limitations on common ownership impair, rather than advance, the Commission's goals of competition, diversity and localism.

Given the deregulatory presumption of the Telecommunications Act of 1996 (the "1996 Act"), proponents of deregulation, like the Joint Commenters, are under no duty to present evidence in support of their position. Nonetheless, the Joint Commenters commissioned Economists Incorporated ("EI") to undertake eight economic studies. Through these studies, EI determined that the current ownership rules unfairly and unnecessarily constrain only one player – broadcasters – in the vast media universe. Other proponents of deregulation submitted equally rigorous empirical studies that provide strong support for repeal of the ownership rules.

In contrast, as the D.C. Circuit has made clear, the deregulatory presumption of Section 202(h) of the 1996 Act squarely placed the burden on *opponents* of deregulation to submit evidence in support of their position. Yet, the opponents have utterly failed to meet

this burden. Their comments provide no evidence to justify continued media ownership regulation that targets only the broadcast industry. Instead, their efforts consist of nitpicking the *Ownership Studies*, or recycling outdated and inapposite studies. In fact, as EI points out in an exhibit attached to these Reply Comments, many of the opponents' purported research conclusions are "illogical and self-contradictory," and the studies upon which they rely fail to support the propositions for which they are cited. None of the opponents, moreover, has presented a systematic and comprehensive investigation of current market conditions, certainly nothing approaching the rigor of the multiple regression analyses and other studies undertaken by EI as well as by other proponents of deregulation. Their inability to do so is wholly unsurprising in view of the vibrant competition and almost limitless variety of media outlets available today to virtually all consumers.

While the record is devoid of any reliable data justifying continued broadcast-specific ownership restrictions, repeal of the rules will in no way jeopardize the Commission's goals of competition, diversity and localism. As Dr. Bruce Owen demonstrated in his statement accompanying the Joint Comments, the Commission should achieve its policy objectives not through media-specific ownership rules, which implicitly define markets based on arbitrary distinctions that have no bearing on consumer welfare, but rather should rely on the antitrust laws to maintain a robust and competitive marketplace of ideas. As Dr. Owen explained, if a transaction passes muster under the Merger Guidelines, it poses no threat of undue concentration in the marketplace of ideas. In contrast to economic markets, which are often narrowly defined on the basis of a single technology (e.g., radio), the marketplace of ideas is much broader and less concentrated because it includes any medium that can contribute to public discourse. As a result, a merger will trip antitrust safeguards long before it poses a threat to competition in the marketplace of ideas.

Still, if the Commission harbors any residual concern that competition laws are not sufficiently protective, then the only regulation the Commission should consider is one that serves as a safety net for local outlet diversity. The Joint Commenters provided the Commission with a proposal for a unitary local media ownership rule that flexibly and rationally delineates the marketplace of ideas and that the Commission could easily implement. The unitary rule would take into account not only broadcast stations and daily newspapers, but all available media providing local information, including the Internet, cable/DBS, weekly newspapers and regional magazines. Because any outlet can contribute to public discourse – Internet journalists sparked media fires that led to the impeachment of a president and the downfall of a Senate majority leader – all outlets should receive equal weight as sources of diversity.

Contrary to the concerns expressed by some commenters, applying a unitary rule would not be an impractical or even a difficult undertaking. Because all outlets should be counted equally in the marketplace of ideas, no complex computation of market shares is necessary. Instead, a unitary rule would merely require applicants for approval of a merger to identify the outlets serving their market and to demonstrate that, post merger, sufficient outlets remain to prevent undue concentration in the marketplace of ideas. If the number of independent outlets remaining after the merger would fall below a Commission established safe harbor (a "soft cap"), applicants could demonstrate that the merger nevertheless would not threaten viewpoint diversity. EI, in a study attached to the Joint Comments, set forth a simple approach for assuring that only outlets serving the audience of the merger parties are counted.

The Joint Commenters' unitary rule – a metric for the analysis of diversity that parallels the Merger Guidelines of the Department of Justice and Federal Trade Commission – provides a judicially sustainable backstop for competition laws. Unlike the current rules, which discriminate against broadcasters by unnecessarily preventing them from pursuing efficiency-enhancing transactions, the unitary rule would properly assess the full extent of competition in the marketplace of ideas. Borrowing from the concepts of antitrust enforcement, the unitary rule would be far easier to apply to the marketplace of ideas than case-by-case analysis of economic markets, since outlets are weighted equally and information as to the availability of outlets is found in widely published sources. As a safe harbor (or soft cap), the rule also would not arbitrarily forbid potentially beneficial transactions out of hand. The Commission, moreover, need revisit the unitary rule in future biennial reviews only to add or subtract classes of outlets cognizable under the rule as necessary to reflect technological change.

The Commission now has before it a fully developed record enabling it to answer the central question posed in the *Notice* – whether it can justify retention of media-specific ownership regulations given the current state of media competition. The evidence presented in the *Ownership Studies*, the EI Studies and studies submitted by other proponents of deregulation provides a clear-cut answer: The Commission's goals are fully achieved through the workings of the modern media marketplace, subject to the safeguards provided by the antitrust laws. The existing ownership regime, premised on media specific regulations, is inherently arbitrary and cannot be sustained under the 1996 Act. Nor can the

Commission satisfy its obligations by relying on the unsupported rhetoric of the opponents of deregulation. Empirical evidence exposes the emptiness of the opponents' words and proves beyond any doubt that the Commission should move expeditiously to dismantle its existing media ownership regime.

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REPLY COMMENTS OF FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC., NATIONAL BROADCASTING COMPANY, INC. AND TELEMUNDO COMMUNICATIONS GROUP, INC., AND VIACOM

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. ("Fox"), National Broadcasting Company, Inc. and Telemundo Communications Group, Inc. ("NBC/Telemundo"), and Viacom (collectively the "Joint Commenters") hereby submit their reply to the comments filed in response to the Commission's *Notice of Proposed Rulemaking*,[1] released in September of 2002, initiating a comprehensive review of the media ownership rules in accordance with the biennial review requirements of Section 202(h) of the

[1] *See In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 02-249 (released September 23, 2002) ("*Notice*"). The Joint Commenters submitted their initial comments in this proceeding on January 2, 2003 ("Joint Comments").

Telecommunications Act of 1996.[2] None of the commenters in this proceeding has submitted evidence sufficient to overcome the deregulatory presumption set forth in Section 202(h) of the 1996 Act, which requires repeal or modification of broadcast ownership regulations unless they are demonstrated to be necessary to serve the public interest. On the contrary, the record before the Commission – including the *Ownership Studies*,[3] the EI Economic Studies,[4] as well as additional studies submitted by other commenters in this proceeding – demonstrates that the modern media marketplace is far superior to regulation in delivering readily accessible, robustly competitive and extraordinarily diverse local, national and international voices.

Indeed, both the Commission and a variety of commenters – ranging from small and large broadcasters to public interest groups – have recognized that a vast and almost inconceivable transformation of the market has taken place since the Commission set out 60 years ago to impose an atomistic structure on the broadcast industry.[5] When the Commission first began to piece together its regulatory scheme, many of the media that consumers turn to today had yet to be invented, let alone adopted on a wide-scale basis. In contrast, enormous diversity and intense competition, both *within* and *among* specific forms of media,

2 Telecommunications Act of 1996, Pub. L. No. 104-104 (1996), § 202(h) ("1996 Act").

3 *See FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadline for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, Public Notice (October 1, 2002) ("*Ownership Studies*"). Individual studies are referred to by their study number.

4 The Joint Commenters retained Economists Incorporated ("EI") to conduct a series of economic studies (the "EI Economic Studies") regarding the Commission's ownership rules. The EI Economic Studies were attached as Exhibits to the Joint Comments.

5 *See, e.g., Notice*, at ¶ 4; *Comments of Communications Science and Technology, Inc.*, at 2-3; *Comments of Gannett Co., Inc.* ("Gannett Comments"), at 9-11; *Comments of Gray Television, Inc.*, at 2-3; *Comments of Morris Communications Corporation* ("Morris Comments"), at 10-12; *Comments of The National Association of Broadcasters* ("NAB Comments"), at 15. *See also* Joint Comments, at 10-26.

characterize every aspect of the 21st Century media world. The Joint Commenters provided a telling illustration of this media transformation by looking at the plethora of options available to consumers today in two representative markets: one very large, Washington, D.C., and one very small, Burlington, Vt./Plattsburgh, N.Y.[6] From a wide array of new audio and video choices to the powerful emergence of the Internet, the Joint Commenters showed that citizens of both large cities and small towns have access to an overwhelming number of media outlets.[7]

Ultimately, the comments submitted in this proceeding by both the Joint Commenters and others have revealed for the Commission a single, clear path – elimination of the current broadcast ownership limits. Given the ferocious competitiveness and tremendous diversity of the modern media marketplace, the strict deregulatory presumption of the 1996 Act leaves the Commission little choice but to follow that path.

I. UNDER ANY INTERPRETATION, SECTION 202(H) OF THE 1996 ACT COMPELS SWIFT, CONSISTENT DEREGULATORY ACTION BY THE COMMISSION

Congress, recognizing the powerful competition in the modern media marketplace, required the Commission in the 1996 Act to repeal or modify media ownership regulations unless they "are necessary . . . as the result of competition."[8] In light of the clearly expressed Congressional mandate for deregulation – which the Commission appropriately acknowledges in the *Notice*[9] – the opponents of deregulation bear a heavy burden to demonstrate that the Commission's structural media ownership regulations are necessary to

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6 *See* Joint Comments, at 12-13.

7 *Id*.

8 1996 Act, at § 202(h).

9 *See Notice* at ¶ 3.

serve the public interest. If they cannot do so, the Commission must repeal those media ownership regulations. None of the comments submitted by opponents of deregulation even approaches, let alone overcomes, the extremely high burden they bear. This conclusion applies with equal force to opponents of deregulation who claim that each and every one of the Commission's broadcast ownership regulations must be retained,[10] as well as to those commenters who, for reasons of purely private interest, attempt to pick and choose which rules should be retained and which should be repealed.[11]

In response to the Commission's call for comments on the proper interpretation of Section 202(h) of the 1996 Act,[12] the Joint Commenters submitted a *Statutory Analysis* as an Exhibit to their comments.[13] The *Statutory Analysis* demonstrated that three overriding principles must guide the Commission as it implements the dictates of Section 202(h): (i) the provision contains a strong deregulatory presumption, (ii) the Commission cannot employ a wait-and-see approach to media ownership regulation, and (iii) broadcast ownership regulations must be consistent in both reasoning and outcome. None of the comments casts any serious doubt on the validity of these overriding principles.

Deregulatory Presumption. As noted by the Joint Commenters and many others,[14] the United States Court of Appeals for the D.C. Circuit in *Fox Television Stations, Inc. v.*

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10 *See, e.g., Comments of National Organization for Women* ("NOW Comments") (arguing for retention of all existing media ownership regulations and perhaps enhancement of those regulations).

11 *See, e.g., Comments of Cox Enterprises, Inc.* ("Cox Comments") (arguing for retention of the national television ownership cap but repeal of the newspaper/broadcast cross-ownership rule).

12 *See Notice* at ¶ 18.

13 *See* Joint Comments, at Exhibit 1, *Statutory Analysis: Legal Standards Governing the FCC's Mass Media Biennial Review Proceedings* ("*Statutory Analysis*").

14 *See* Joint Comments, at 4; *Comments of Duhamel Broadcasting Enterprises*, at 2; Gannett Comments, at 8.

FCC relied upon the "presumption in favor of repealing or modifying the ownership rules" to remand the national TV ownership cap and vacate the television/cable cross-ownership rule.[15] Likewise, in *Sinclair Broadcast Group, Inc. v. FCC*, the D.C. Circuit relied upon the same presumption in remanding to the Commission certain aspects of the local TV multiple ownership rule.[16] And, as noted above, the Commission itself acknowledges in the *Notice* the clear deregulatory presumption mandated by Section 202(h).[17] Even some of the most vociferous opponents of deregulation do not question this fundamental deregulatory program Congress set out in the 1996 Act and Section 202(h).[18]

While the deregulatory presumption set forth in Section 202(h) is abundantly clear, the Commission called for comment on the precise meaning of the phrase "necessary in the public interest" in Section 202(h) of the 1996 Act.[19] NAB, in response, argues "that Section 202(h) [cannot] fairly be read as requiring that the Commission demonstrate the ownership rules to be indispensable or essential so as to justify their retention . . . ."[20] Other parties make similar claims.[21] As the *Statutory Analysis* demonstrates, however, traditional tools of

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15 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*"), *rehearing granted in part*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox Rehearing Decision*").

16 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

17 *See Notice* at ¶ 3.

18 *See, e.g., Comments of The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press* ("UCC Comments") (arguing for retention of all media ownership regulations and considering the proper interpretation of "necessary" but remaining silent on the deregulatory presumption set forth in Section 202(h)); *Comments of American Federation of Labor and Congress of Industrial Organizations* ("AFL-CIO Comments") (arguing for retention of all media ownership regulations yet failing to address the deregulatory presumption in Section 202(h)).

19 *See Notice* at ¶ 16.

20 NAB Comments, at i.

21 *See, e.g., Comments of American Women in Radio and Television, Inc.* ("AWRT" or "AWRT Comments"), at 3-4; *Comments of Children Now, et al.* ("Children Now Comments"), at 4.

statutory construction and interpretation lead inevitably to a contrary conclusion: the word "necessary" should be given its "plain meaning," which is "logically unavoidable," "compulsory," or "required."[22] In the words of the D.C. Circuit, "[s]omething is *necessary* if it is *required* or *indispensable* to achieve a certain result."[23]

In any event, under any permissible interpretation, the media ownership rules warrant repeal. Even under the most relaxed interpretation of what constitutes a rule that is "necessary" in the public interest, the opponents of deregulation fail to satisfy their substantial burden to demonstrate that the existing media ownership rules are necessary to serve the Commission's policy goals of competition, diversity and localism.

Wait-and-See Approach. Several parties ask the Commission to refrain from acting quickly on its biennial review obligations and, instead, to adopt a wait-and-see approach to deregulation. Diversity and Competition Supporters, for example, recommend that the Commission adopt a "Staged Implementation Plan" and monitor market developments before moving on to the next "Stage" of deregulation.[24] The Information Policy Institute likewise recommends that the Commission "undertake further study before relaxing regulations in such a way that would encourage further market consolidation and concentration."[25] While the Diversity Comments raise important issues regarding minority ownership that could –

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22 *Statutory Analysis*, at 11.

23 *GTE v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) (emphasis added).

24 *Comments of Diversity and Competition Supporters* ("Diversity Comments"), at 82-102.

25 *Comments of The Information Policy Institute* ("Information Policy Institute Comments"), at 7.

and in many cases should – be addressed in another context or proceeding, the dictates of Section 202(h) require the Commission to act now on its biennial review obligations.[26]

As the *Statutory Analysis* explains, the D.C. Circuit in both *Fox* and *Sinclair* explicitly rejected the FCC's practice of continually deferring decisions as it observes marketplace developments.[27] The Court concluded that this "wait-and-see approach cannot be squared with [the] statutory mandate [to act] promptly – that is, by revisiting the matter biennially – to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[28] In short, the time to present empirical evidence concerning whether the media ownership regulations are "necessary in the public interest" is *now*. Likewise, the time to determine whether the media ownership regulations can be justified in light of this standard is *now*. If the Commission cannot present a sufficient basis to justify retention of its rules at the conclusion of this proceeding, the rules must be eliminated or modified.

Consistency of Rationale and Result. In *Sinclair*, the D.C. Circuit emphasized the need for consistency among the Commission's numerous media ownership regulations. In particular, the Court criticized the FCC's failure to explain why its definition of voices differs for purposes of the local TV multiple ownership rule (which includes only broadcast TV as voices) and the radio/TV cross-ownership rule (which includes major newspapers and cable

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26 *See generally* Section V. *infra* for a discussion of the proposals advanced by the Diversity and Competition Supporters.

27 *See Fox*, 280 F.3d at 1044; *Sinclair*, 284 F.3d at 164. For example, in the *1998 Biennial Review Order* the Commission decided that "prudence dictates that we should monitor the impact of our recent decisions regarding local television ownership and any impact they may have on diversity and competition prior to relaxing the national reach cap." *In Re 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11072-73 (2000) ("*1998 Biennial Review Order*").

28 *Fox*, 280 F.3d at 1042; *Sinclair*, 284 F.3d at 164.

television as voices).[29] In the Court's view, the FCC's failure to explain the different definitions of voices for the two rules "underscored" the "deficiency of [its] explanation" for retaining the local TV multiple ownership rule.[30] Accordingly, the Commission not only must find, based on the empirical evidence in this proceeding, that its media ownership rules are necessary (i.e., indispensable) to serve the Commission's policy goals, but if it chooses to retain some regulations, those rules must be both internally consistent and consistent with one another.

The consistency requirement, moreover, includes fidelity to prior decisions or an explanation of the grounds for departing from precedent. The Court in *Fox*, for example, noted that the Commission could not justify retention of the national TV ownership cap to address diversity concerns without first "stat[ing] the reasons for which it believes its contrary views set out in the [*1984 Multiple Ownership Order*] were incorrect or inapplicable in the light of changed circumstances."[31] The Commission's *1984 Multiple Ownership Order*[32] set forth numerous conclusions concerning the media marketplace and the need for regulation that apply with equal vigor to virtually all of the Commission's media ownership regulations:

- <u>One Owner Does Not Equal One Voice</u>. Multiple owners do not "impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions."[33]

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29 *See Sinclair*, 284 F.3d at 164.

30 *Id.*

31 *Fox*, 280 F.3d at 1048.

32 *See In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984) ("*1984 Multiple Ownership Order*").

33 *Id*. at ¶ 9.

- <u>All Media Count for Purposes of Viewpoint Diversity</u>. The mass media relevant to viewpoint diversity concerns "includes a wide variety of active, energetic organs engaged in television and radio, but also cable, video cassette recorders, newspapers, magazines, books, and, when they are in operation, MDS, STV, LPTV, and DBS, all of which should be considered when evaluating diversity concerns."[34]

- <u>Modern Media Are Substitutable</u>. All modern media act as substitutes in the provision of news and information.[35]

- <u>Broadcasting Not Unique</u>. Broadcasters are not "unique" in their "power to influence or persuade."[36] Indeed, the view that broadcasting is somehow different from other media "ignores the multitudinous alternative outlets for the expression of ideas and the diversity of conflicting opinions and ideas among broadcast outlets themselves."[37]

- <u>Spectrum Scarcity No Basis for Disparate Treatment of Broadcasters</u>. The Commission's traditional rationale for restricting multiple ownership of broadcast stations – spectrum scarcity – is "increasingly anachronistic" and "fails to distinguish broadcasting in any practical sense from other businesses."[38]

Any Commission decision promulgating new media ownership regulations must account for the conclusions set forth in the *1984 Multiple Ownership Order* or explain – based on empirical evidence reflecting the current state of the media marketplace – why the conclusions set forth in that decision are no longer true. The Joint Commenters submit that a review of the changes in the modern media marketplace over the two decades since the

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34 *Id.* at ¶ 30. The FCC also concluded that it was "entirely appropriate for the Commission to attempt to evaluate the future of the broadcast and cablecast market and of the new technologies and services as part of this rulemaking." *Id.* at ¶ 40.

35 *Id.* at ¶ 28 (describing Roper poll finding that "various media are substitutes in the provision of news" and noting that the "fact that the respondents listed more than one choice implies that people actually use more than one medium as a news source"). *See also id.* at ¶ 25.

36 *Id.* at ¶ 8.

37 *Id.*

38 *Id.* at ¶ 7.

issuance of the *1984 Multiple Ownership Order* conclusively demonstrates that the Commission's views concerning the increasing competition in the media marketplace and the diminishing need for regulation are now more compelling than ever.

Faced with these guiding principles, it is incumbent upon the opponents of deregulation to present well documented empirical evidence in support of the existing rules. Recognizing its obligations as delineated by the Court in *Fox* and *Sinclair*, the Commission "strongly encourage[d] commenters to provide empirical evidence to buttress their assertions."[39] While the Joint Commenters, in light of the deregulatory presumption of the 1996 Act, had no need to submit evidence to support repeal of the rules, they submitted the eight EI Economic Studies and brought to the Commission's attention other independent studies of consumer behavior in the media marketplace.[40] The Commission also released the *Ownership Studies*, which in key respects support repeal or modification of the rules. In contrast, the opponents of deregulation have largely relied on "expert" critiques of the *Ownership Studies* and provide little empirical evidence of their own in support of the existing rules. As EI points out in its Economic Comments attached as an exhibit to these Reply Comments, many of the opponents' purported research conclusions are "illogical and self-contradictory," and the studies upon which they rely fail to support the propositions for which they are cited.[41] Nor have the opponents submitted any credible evidence to rebut the conclusion that the modern media marketplace is extraordinarily diverse and competitive.

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[39] *Notice* at ¶ 19.

[40] *See* Joint Comments, at 20, 23 (consumer reliance on the Internet and interpersonal communication).

[41] *See* Exhibit, *Economic Comments on Media Ownership Issues* ("EI Economic Comments"), at 2.

II. THE OPPONENTS OF DEREGULATION WOEFULLY UNDERESTIMATE THE DIVERSITY AND COMPETITIVENESS OF THE MODERN MEDIA MARKETPLACE AND THE POWER OF THE INTERNET TO FURTHER PUBLIC DEBATE

The Joint Commenters provided the Commission with a detailed description of the dramatic growth that has generated the competitive array of content options now comprising the modern media marketplace.[42] With nearly 26,000 broadcast stations across the country, multichannel video programming distributors ("MVPDs") serving as many as 90 percent of American homes, a wide assortment of books, newspapers and magazines, and, of course, the emergence of the Internet, American consumers have access to a multitude of diverse content choices that contribute to their viewpoint formation. Empirical evidence demonstrates that consumers readily make use of each of these media – often using multiple outlets simultaneously and easily substituting one for another – to obtain news, information and entertainment.[43]

Certain commenters have suggested that the modern media landscape is fragmented, and that consumers do not in fact use media interchangeably.[44] The Joint Commenters submit that these views lack any factual support. These opponents of deregulation cling tenaciously to an outmoded and unrealistic view of the media marketplace as a small universe of a finite set of traditional media outlets – namely broadcasters. They ignore the abundance of modern alternatives – cable, DBS, print media, and most importantly, the

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42 *See* Joint Comments, at 10-26.

43 *See, e.g.*, Joel Waldfogel, *Consumer Substitution Among Media*, September 2002 ("Study #3"); Nielsen Media Research, *Consumer Survey On Media Usage*, September 2002 ("Study #8").

44 *See Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project* ("CFA" or "CFA Comments"), at 98; *Comments of Communications Workers of America, The Newspaper Guild/CWA, National Association of Broadcast Employees and Technicians/CWA and Printing, Publishing, and Media Workers Section/CWA* ("CWA" or "CWA Comments"), at 8-13; AFL-CIO Comments, at 9-12.

Internet – as well as the strong empirical evidence that irrefutably shows the frequency and ease with which consumers transition between media. The Commission listens to their siren song at its peril.

In particular, the Consumer Federation of America, et al. argues that as the "two dominant political media," daily newspapers and television stations have a "special influence on political discourse."[45] In doing so, the CFA Comments attempt to compartmentalize other media as serving distinct roles for distinct groups of people. CFA claims, for example, that satellite is a "high-cost, niche distribution system" that "does not compete with basic cable."[46] Similarly, they allege that the Internet is mainly used as a "shopping mall" that "has not yet significantly altered the dynamics of mass media."[47] These assertions, however, are clearly belied by the facts. Far from being "niche" players, the nation's two DBS providers each rank among the top 5 largest MVPDs in the country and are price-competitive with cable (often undercutting cable subscription fees).[48] Together, they boast nearly 20 million subscribers and an impressive 30 percent average annual subscriber growth rate for the last five years.[49] Moreover, several studies demonstrate that Americans are increasingly turning to the Internet for a variety of purposes far beyond simple consumer purchasing.[50] In spite of

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45 CFA Comments, at 98.

46 *Id*. at 123.

47 *Id*. at 124-25.

48 *See In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, FCC 02-338 (released December 31, 2002) ("*Video Competition Report*"), at ¶ 13.

49 *See* Joint Comments, at 16.

50 *See* Joint Comments, at 19-20 (noting that a "growing number of Americans are clicking the 'word-of-mouse' option of the World Wide Web" and that the number of people who reporting using the Internet to obtain news and information in an average week more than doubled between 1997 and 2000).

these plain facts, the CFA Comments erroneously claim that there is no significant consumer substitutability among media.[51] The *Ownership Studies*, however, as the NAB Comments point out, "reveal considerable substitutability between . . . media for various uses."[52]

The CFA Comments, furthermore, do not introduce any new data to meet their burden under the 1996 Act. Instead, they merely attempt – unsuccessfully – to point out flaws in Study #3 and Study #8, both of which conclude that consumers view different media as substitutes for one another and use different media interchangeably. Calling the existence of consumer substitution "questionable," the CFA Comments nonetheless concede that vast numbers of Americans utilize a wide variety of different media – both as news and entertainment sources.[53]

Likewise, although critical of Study #3, the Communications Workers of America, et al. nonetheless admit that Study #8 "suggest[s] substitutability."[54] The CWA Comments attempt to discount the validity of Study #8, arguing that it reflects how "[people] hope they will behave, rather than indicating how they actually would behave."[55] While Study #8 did ask consumers to make predictive judgments about how they would increase their usage of one media outlet if their preferred outlet was unavailable, Study #8 also asked numerous questions measuring consumers' actual past behavior.[56] Taking these questions into account,

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51 *See* CFA Comments, at 98, 128.

52 *See* NAB Comments, at 45; *see also* Gannett Comments, at 10-11.

53 *See* CFA Comments, at 105-09, 134.

54 *See* CWA Comments, at 13; *see also* AFL-CIO Comments, at 53-54.

55 *See* CWA Comments, at 13; *see also* AFL-CIO Comments, at 12.

56 *See, e.g.*, Study #8, at Table 001 (asking consumers: "What sources, if any, have you used in the past 7 days for LOCAL news and information?").

as the Joint Commenters did, it becomes clear that consumers' *actual* behavior includes using many types of media interchangeably. Indeed, the questions regarding actual use in Study #8 often garnered responses *substantially* exceeding 100 percent because many consumers explained that they had used more than one source for news and information. The Joint Commenters also pointed to a Roper Study that determined that Americans easily switch between the multiple sources of content available to them.[57] On the whole, the CWA Comments thoroughly misinterpret Study #8, and therefore reach inaccurate conclusions regarding the evidence showing consumer substitutability among media.

In attempting to downplay the existence of consumer substitutability, several commenters have sought to pigeon-hole different types of media into narrow roles.[58] Most prevalently, these commenters have lauded television stations and daily newspapers as intrinsically more valuable than other media outlets.[59] At the same time, a number of parties have been overtly critical, if not downright dismissive, of the role the Internet plays in the modern media marketplace.[60] CFA suggests that because consumers tend to spend more time with some media than others that certain media are more important (i.e., broadcasting or newspapers). CFA, however, ignores the transformational power of the Internet: The medium is more efficient because consumers access only the information they want. They need not, for example, sit through 30 minutes of a local broadcast news program to learn the

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57 *See* Joint Comments, at 26 (citing *Usage and Behavior on the Internet*, Roper ASW (2001) ("Roper Study"), at "Technology Means Flexibility", which found that at least 20 percent of consumers reported using 10 different types of media to obtain news and information).

58 *See, e.g.,* CFA Comments, at 34; CWA Comments, at 5-8. *See also* UCC Comments, at 42-46.

59 *See, e.g.*, CFA Comments, at 34; CWA Comments, at 5-8.

60 *See, e.g.*, CFA Comments, at 289 (arguing that the "amount of news and information gathering on the Internet is small . . . .").

weather forecast. And they need not turn pages and read through entire articles in a newspaper to find information on a particular person or issue. Instead, consumers use search engines on the Internet and on individual Web sites to home in on targeted information. Similarly, new media and new technologies, such as personal video recorders and video-on-demand, have given viewers a greater measure of control over distribution of and access to video content.[61]

In short, the fact that consumers may spend more time with traditional media, because they are slower and more cumbersome means of obtaining information or expressing viewpoints, cannot obscure the ultimate, indisputable conclusion that consumers are utilizing all of the many options available to them and that each media source is equally important from the standpoint of democratic discourse and the marketplace of ideas.[62]

The arguments attempting to draw qualitative distinctions between media are invalid for two fundamental reasons. First, regardless of whether people spend more time watching television and reading newspapers than they do with other media, no single medium holds an exclusive grip on the dissemination of ideas. Indeed, the Commission concluded as much in the *1984 Multiple Ownership Order* when it observed that broadcasters are not "unique" in their "power to influence or persuade."[63] This conclusion is even more true in today's world,

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[61] *See* Diane Mermigas, *Melding Media's Future With Its Past*, Electronic Media, January 13, 2003, at 22 (noting that broadcasters "find themselves involuntarily ceding control of content and distribution to new technology-armed consumers" – consumers that are "discovering the self-determining pleasures" of video-on-demand and personal video recorders).

[62] Interestingly, the CFA Comments claim that if consumers are treating products as truly substitutable, "we would expect to find that they are negatively correlated." CFA Comments, at 128. In other words, "the more a consumer uses one type of media, the less they would use other types." *Id*. Of course, this narrow view ignores the reality that consumers utilize all of the media outlets available to them, and often use multiple outlets for the same purpose or even at the same time. Even the CFA Comments recognize that "[t]he more people use one type of medium, the more they use the others." *Id*.

[63] *1984 Multiple Ownership Order*, at ¶ 8.

where cable continues to erode broadcasters' viewing share, and where a single Internet site can set in motion a chain of events leading to the impeachment of President Bill Clinton. In short, broadcast television and radio stations and newspapers cannot unilaterally control the flow of information and ideas.

Second, a narrow focus on traditional media wholly ignores the dramatic way the Internet has transformed the modern media marketplace. Indeed, with literally hundreds of millions of Web sites offering access to a mind-boggling array of ideas, it would be difficult to overstate the remarkable impact the Internet has had on the way Americans receive news, information and entertainment content. As the Joint Commenters showed, nearly 170 million Americans now have access to the Internet at home, and 66 percent of Americans had access to the Internet at work as of August 2001.[64] In addition, those without access at home or work often have free access at schools or local public libraries.

In light of the Internet's ubiquitous accessibility and its enormous variety of content, CWA's claim that the "Internet is not a mass medium"[65] is simply indefensible. While studies reveal varying information about the amount of time people spend online – and how that amount compares to the time spent with other media – there can be no dispute as to the Internet's ability to affect public discourse. As the Joint Commenters pointed out, the Internet played a crucial role in the recent downfall of the majority leader of the United States Senate by disseminating the story surrounding Senator Trent Lott's controversial remarks at Strom Thurmond's birthday party.[66] Even though most of the mainstream press

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64 *See* Joint Comments, at 19.

65 *See* CWA Comments, at 7.

66 *See* Joint Comments, at 22.

failed to pick up on the story initially, "[W]eb writers were leading the charge" in a way that "helped force the story into public view" by spurring traditional journalists to cover the story.[67] Moreover, contrary to the assertions of the AFL-CIO Comments that all Internet sources are affiliated with or controlled by traditional media outlets,[68] the Internet journalists that broke the Lott and Clinton stories were independent operators.[69] The Joint Commenters submit that the FCC would be hard-pressed to find in history a *more* fundamental change in the forum for public discourse than the sweeping transformation engendered by the Internet, which is why the Joint Commenters firmly believe that the Commission no longer has any valid rationale for applying different weights to different types of media outlets. In a world where so many outlets vie for consumers' attention, and where such a wide array of sources have an equal opportunity to spur new ideas into public debate, the only rational option for the Commission in evaluating diversity is to treat all media equally.

III. MEDIA-SPECIFIC OWNERSHIP REGULATIONS ARE INHERENTLY ARBITRARY AND, THEREFORE, CANNOT BE DEEMED "NECESSARY IN THE PUBLIC INTEREST" AS REQUIRED BY SECTION 202(H) OF THE 1996 ACT

To assist the Commission in its reexamination of the assumptions underlying the current media ownership regime, the Joint Commenters included as Exhibit 3 to their comments the statement of Dr. Bruce Owen, who analyzed the current state of the media marketplace and offered his expert view on the kinds of regulations that would best serve the

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[67] Joint Comments, at 22.

[68] *See* AFL-CIO Comments, at 14.

[69] Matt Drudge broke the Clinton story and a variety of independent Web operators, including a law professor's "InstaPundit" column, broke the Lott story. *See* Joint Comments, at 22-23.

Commission's "touchstone" policy goal: viewpoint diversity.[70] Dr. Owen concluded that reliance on antitrust and competition laws is sufficient to maintain adequate diversity in the marketplace of ideas – the phrase Dr. Owen uses to describe a robust media marketplace where diverse viewpoints abound.

Dr. Owen demonstrated that the analytical approach of the 1992 Horizontal Merger Guidelines ("Merger Guidelines") used by the Department of Justice and the Federal Trade Commission should form the basis of the Commission's analysis of its media ownership regulations. Given that antitrust and competition laws are enforced on markets that are narrower, more concentrated, and in which the barriers to entry are much higher than in the marketplace of ideas, application of these antitrust and competition laws will ensure that media consolidation will be reined in long before it poses any threat to the flourishing diversity of viewpoints generated by competition in the marketplace of ideas.

None of the comments presented to the Commission in this proceeding undercuts the principles espoused in the Owen Statement. On the contrary, several commenters agree that the Merger Guidelines offer the Commission an effective way to measure concentration.[71] The CFA Comments, for example, cite the Merger Guidelines as an appropriate method "to assess the potential for the exercise of market power resulting from a merger."[72] Thus, while

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70 *See* Joint Comments, at Exhibit 3, *Statement on Media Ownership Rules of Dr. Bruce M. Owen* ("Owen Statement").

71 *See, e.g.*, CFA Comments, at 150-51 and 285; *Comments of Eli Noam*, at 4; *Comments of Clear Channel Communications, Inc.* ("Clear Channel Comments"), at 8. The Clear Channel Comments submitted as an exhibit a statement by Professor Jerry A. Hausman, which relies in part on the Merger Guidelines and their Herfindahl-Hirschman Index ("HHI") to conclude that increases in concentration in the radio market do not lead to higher advertising prices. *See id*. at Statement of Professor Jerry A. Hausman (the "Hausman Statement"), 3-4.

72 *See* CFA Comments, at 150-51. The CFA Comments even propose that the Commission revise its ownership rules to employ an "HHI-adjusted voice count." *See id*. at 285. As the EI Economic Comments note, however, the CFA Comments would increase the range of market structures considered to be highly concentrated by lowering the bottom of that range from an HHI of 1800 in the

the Commission has not been presented with any reason to question Dr. Owen's conclusions, there is considerable support in the record – from across the ideological spectrum – for reliance on the principles of the Merger Guidelines.

A. Media-Specific Rules, Based on Technological Distinctions, Lack Any Conceptual or Empirical Link to Consumer Harm From Ownership Concentration

As Dr. Owen explained, the "determination of relevant market(s) cannot be prejudged in today's complex and changing media industries by establishing arbitrary *a priori* boundaries . . . ."[73] The Commission's current rules, however, "are based entirely on technology and other such *a priori* distinctions." It makes no sense to define markets "in terms of particular technologies, such as radio broadcasting, television broadcasting, cable transmission or newspaper publishing" since these distinctions "bear [no] useful relationship to customer behavior in media markets as the Commission's own evidence amply demonstrates."[74] The Commission need look no further than its own recent analysis of the MVPD marketplace for an example of how technological differences do not preclude *bona fide* competition: In the AT&T/Comcast merger, the FCC deemed DBS to be a *bona fide* competitor to cable, even though the two use significantly different technologies.[75] Cable operators likewise have emerged as a direct competitor to television broadcast stations in all respects, and have gained a notable and increasing percentage of the local television

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Merger Guidelines to an HHI of 1,667. "[CFA] offers no reason why anticompetitive conduct is likely at a lower concentration level in these media than in other parts of the economy." *See* EI Economic Comments, at 14.

73 Owen Statement, at 3.

74 *Id*. at 3.

75 *See generally In Re Application for Consent to the Transfer of Control of Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* FCC 02-310, Memorandum Opinion & Order (released November 14, 2002).

advertising market.[76] In a media world that is constantly changing, and in which consumers have demonstrated their eager willingness to adapt to new technologies and sources, it is irrational to establish rigid regulatory boundaries between media.[77]

Despite the clear evidence that consumers treat broadcast outlets as just one choice from a varied menu of media alternatives, the Commission's rules continue to hamstring only broadcasters' ability to compete. Out of all the choices available in today's multifaceted media marketplace, only a single segment – broadcasting – is subject to an unduly restrictive hard cap on local ownership. In contrast, newspapers and the Internet are not subject to direct ownership regulations, even though they too play critical roles in contributing to the marketplace of ideas and to consumers' viewpoint formation. The rules' unjustified disparate treatment of broadcasters is nothing short of arbitrary and, if current trends continue, dangerous to the viability of free, over-the-air broadcasting.

The current system of rules, so fraught with inconsistencies, cannot possibly survive the scrutiny that Section 202(h) demands. A far more rational approach, as indicated by Dr. Owen, is to rely solely upon application of antitrust and competition laws to economic markets, which are sufficient to ensure that the Commission's policy goals will be realized.

B. The Joint Commenters' Proposed Unitary Rule – Merger Guidelines for the Marketplace of Ideas – Provides an Eminently Workable and Non-Arbitrary Backstop to the Antitrust Laws

The record before the Commission amply demonstrates that market forces coupled with antitrust enforcement are more than adequate to protect the FCC's legitimate public interest objectives. Still, if the Commission harbors any concerns about the theoretical risk

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[76] *See* Diane Mermigas, *Rivalry to Grow Between Stations, Cable Systems*, Electronic Media, January 6, 2003, at 4.

[77] *See* Owen Statement, at 3.

that the antitrust laws will not adequately protect competition in the marketplace of ideas, then the only rational regulation the Commission should consider is one that serves as a safety net for local outlet diversity.

The Joint Commenters provided the Commission with a proposal for a unitary local media ownership rule that flexibly and rationally delineates the marketplace of ideas, and which the Commission easily could implement.[78] The safe harbor nature of the proposed rule (which alternatively can be expressed as a soft cap) also conveys clear public interest benefits: it would provide guidance to media owners and investors; it would preserve Commission resources by limiting FCC review only to problematic cases; it would enable parties proposing to exceed the safe harbor (or soft cap) to demonstrate the public interest benefits of a particular transaction without requiring a waiver; and perhaps most importantly, its rational, empirically-based approach would be judicially sustainable.

The Joint Commenters demonstrated, moreover, that any local ownership rule must be technology-neutral and account equally for all voices. Given the incredibly vast array of media options available to consumers today, and the evidence showing how consumers freely utilize all of these sources, any rule attempting to draw distinct boundaries around specific types of media would be inherently arbitrary. At the same time, as Dr. Owen explained, there is no logical reason for a rule to accord different weights to different types of media.[79] "[W]hat matters is the number of alternative information outlets available to consumers, not the current popularity, much less the technology of transmission, of the ideas currently

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78 *See* Joint Comments, at 65; *see also EI Economic Study F: Counting Outlets and Owners in Milwaukee: An Illustrative Example* ("EI Economic Study F"), attached as an Exhibit to the Joint Comments.

79 *See* Joint Comments, at 62; Owen Statement, at 7-9.

communicated by each outlet."[80] Since so many outlets are available to consumers, and since each outlet has equal opportunity to introduce information into the marketplace of ideas, "[t]he rational way to measure the 'share' of each source of ideas available to a given set of consumers . . . is to give each source *equal weight*."[81]

Thus, the Joint Commenters proposed that the Commission establish a technology-neutral unitary rule that weights outlets only on the basis of whether (i) a consumer has the ability to access the outlet in the local market, and (ii) the outlet, includes, or has the capability to include, local content.[82] There is no justifiable alternative proxy to measure or weight the importance of various outlets, and the Commission should therefore recognize that the Joint Commenters' proposed unitary rule is the only approach that can withstand judicial review.

The proposed rule encompasses a safe harbor (or soft cap) benchmark to determine whether FCC review of a particular transaction is needed at all. As Dr. Owen suggested, the Commission should be guided by the Merger Guidelines in establishing a minimum number of independently-owned outlets to ensure adequate competition in the marketplace of ideas. Under this approach, any proposed transaction that would not exceed the safe harbor – i.e., a proposal that would leave intact at least a minimum number of independent owners in a market – would be automatically approved.[83] Alternatively, if a proposed transaction would

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80 *Id*. at 8. As Dr. Owen noted, "politically, socially or otherwise significant information can enter the marketplace of ideas through a single Web site, newsgroup or chat room and be disseminated extremely widely among the community." *Id*. at 13.

81 *See* Owen Statement, at 8 (emphasis added).

82 *See* Joint Comments, at 62-63.

83 The Joint Commenters suggest that the Commission utilize the Herfindahl-Hirschman Index of the Merger Guidelines in determining the appropriate minimum number of owners. The HHI is calculated by squaring the market share of each firm competing in a market and then summing the resulting

result in a number of independently-owned outlets below the safe-harbor benchmark, the transaction would be permitted only upon a further showing by the applicants. (Such a showing might include more detailed information demonstrating that the true scope of viewpoint diversity in a given market is far greater than would be indicated merely by the number of outlets, as well as an analysis of regional and national sources that provide content of local significance.)

EI Economic Study F, attached to the Joint Comments, demonstrated the mechanism for determining the number of voices in a given local market.[84] Using Milwaukee, Wisconsin as a representative example, EI Economic Study F identified 170 outlets with nearly 90 separate owners that provide local content to the average household in Milwaukee.[85] Operating on the premise that only outlets capable of and likely to provide local content should be counted, EI Economic Study F used readily available sources (such as industry publications and Internet search engines) to identify local media outlets and their owners.[86] The results included only those daily newspapers, weekly newspapers, full- and low-power commercial and noncommercial television and radio stations, cable television systems and public access channels, local and regional magazines, and local Internet Web sites centered in or providing local content to the Milwaukee marketplace.

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numbers. The Department of Justice considers HHI levels less than 1000 to represent unconcentrated markets; HHI levels between 1000-1800 represent markets that are moderately concentrated; HHIs exceeding 1800 are considered concentrated. *See The Herfindahl-Hirschman Index*, available at <http://www.usdoj.gov/atr/public/testimony/hhi.htm > (visited January 22, 2003). In selecting a threshold, the Commission should attribute an equal share to each outlet since all outlets in the marketplace of ideas are entitled to equal weight, as the Joint Commenters demonstrated in their opening comments. *See* Joint Comments, at 61-63.

[84] *See generally,* EI Economic Study F. *See also* Joint Comments, at 65-66.

[85] *See* EI Economic Study F, at 8.

[86] *See id*. at 2-7.

More specifically, EI Economic Study F defined the relevant geographic market as the "location of the customers served by both of the merging parties."[87] Since the study used a hypothetical case involving the merger of two television stations, it focused on the Milwaukee designated market area ("DMA"), since the DMA is the geographic area in which the two merging television stations are available.[88] However, if the hypothetical merger dealt with, for instance, a daily newspaper and a radio station, "the geographic area of interest would be the area in which both outlets are available, which could be much different than a DMA."[89]

For each type of media, EI Economic Study F analyzed whether a given outlet was actually available to households throughout the DMA. For example:

- Daily newspapers. The study identified nine daily newspapers that are published in the counties comprising the Milwaukee DMA. However, taking into account the counties in the DMA in which each paper has circulation and using census data for each county, the study found that each household in the Milwaukee DMA has available a weighted average of 1.2 daily newspapers.[90]

- Weekly newspapers. The study determined that a weighted average of 3.2 weekly newspapers is available to each household in the DMA.[91]

- Local magazines. EI Economic Study F identified 12 local magazines that provide Milwaukee-specific content.[92] The study also counted three additional national magazines that publish regional editions with content specifically tailored to Milwaukee.[93]

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87 *See id*. at 1.

88 *See id*.

89 *See id*. at 2.

90 *See id*. at 3.

91 *See id*. at 4.

92 *See id*. at 7.

93 *See id*.

- Radio stations. The study determined that there are 35.2 radio stations available to the average Milwaukee DMA household.[94]

- Cable television. The study counted cable as two voices in the Milwaukee DMA, one for the role it plays in selecting the multichannel programming available in the market and one due to the public access channels that provide content over which the cable operator has no control.[95]

- Web sites. The study found that a variety of sites offer content specific to the Milwaukee DMA, including a large number that are not affiliated with other media outlets.[96]

- Television Stations. The study presumed that any television station operating in the Milwaukee DMA can be viewed throughout the entire DMA.[97]

In sum, EI Economic Study F found 170 different outlets with nearly 90 separate owners that offer Milwaukee-specific content. A hypothetical merger among two television stations would still leave an extremely high number of owners in the Milwaukee DMA, and would pose no threat whatsoever to Milwaukee's diverse and vibrant marketplace of ideas. Equally important, and despite the unfounded fears expressed by some commenters, EI Economic Study F clearly showed that applying a unitary rule would not be an impractical or even a difficult undertaking.

For instance, Bonneville International Corporation suggests that a unitary rule would be "unworkable" because of the "difficulty inherent in determining the number and types of outlets that must be included in such a rule . . . ."[98] The NAB Comments express similar

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94 *See id*. at 5.

95 *See id*. at 6. (Although it did not include DBS in its hypothetical analysis, EI Economic Study F suggested doing so in the future, when technology allows DBS companies to provide original local content.)

96 *See id*. at 7.

97 *See id*. at 4.

98 *See Comments of Bonneville International Corporation* ("Bonneville Comments"), at 10-11.

concerns about the difficulty of identifying and counting voices, as well as the challenge of appropriately defining the correct geographic market.[99] To the contrary, the ease with which EI Economic Study F conducted this very task should put to rest any lingering fears associated with identifying and counting outlets.

Bonneville also claims that "a rule that relies upon a weighted voice test cannot accurately measure how particular media outlets promote diversity, competition, and localism, and cannot respond to technological or competitive developments in the marketplace."[100] As the Joint Commenters already have demonstrated, however, all outlets should be counted equally since each outlet, regardless of its technology, is capable of delivering information and viewpoints to its audience. And the unitary rule could not satisfy the dictates of Section 202(h) if certain outlets are arbitrarily excluded. In fact, it is the very concept of equal weighting that makes it easy to utilize a Merger Guidelines approach in the marketplace of ideas, since equal weighting eliminates the need to calculate the individual revenue shares of each of the relevant market participants. Moreover, by rejecting the current rules' reliance on arbitrary boundaries between media, a unitary rule would be flexible enough to take into account emerging technological and competitive developments.[101] Indeed, the Commission's future biennial reviews could focus only on "tweaking" a unitary rule so as to determine which new media should be added.

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99 *See* NAB Comments, at 53-54.

100 *See* Bonneville Comments, at 11.

101 CWA and CFA also propose that the Commission implement a unitary rule. *See* CWA Comments, at 46-47; CFA Comments, at 284-289. Their suggested rules, however, are unitary in name only. In fact, the proposals suggest that the FCC continue to look at broadcasting, cable television and newspapers as distinct types of media requiring unique and separate regulatory review. Thus, the proposals would perpetuate the arbitrary boundaries between media that plague the Commission's current ownership regime.

In short, the Joint Commenters' proposed unitary rule would provide the Commission a safety net for outlet diversity and ensure the continuation of robust competition in the marketplace of ideas wherever media outlets propose to merge. Perhaps just as importantly, the unitary rule – the equivalent of Merger Guidelines with HHI analysis for the marketplace of ideas – would provide the Commission a workable construct for analyzing the impact of a transaction on consumer welfare in a way that is far more accurate than the current media specific rules.

IV. THE OPPONENTS OF DEREGULATION HAVE FAILED TO PRESENT CREDIBLE EVIDENCE TO SUSTAIN ANY OF THE COMMISSION'S MEDIA-SPECIFIC OWNERSHIP REGULATIONS IN LIGHT OF THE DEREGULATORY PRESUMPTION OF THE 1996 ACT

A review of the comments demonstrates that many parties, without the slightest effort to comply with Section 202(h), urge the Commission to retain all of its broadcast ownership regulations.[102] Other commenters urge the Commission to retain some of its rules and to jettison others, again with no empirical basis for the disparate treatment.[103] Likewise, many parties recommend that the Commission modify its existing rules in ways that are no more based on empirical evidence than the rules as presently formulated.[104] Although such tinkering may advance certain private interests, these parties cannot demonstrate that any

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[102] *See, e.g., Comments of American Federation of Television and Radio Artists, Writers Guild of America, East* ("AFTRA Comments") (requesting retention of all current rules); CWA Comments (asking the FCC to maintain in its entirety the existing ownership regime).

[103] *See, e.g.*, NAB Comments (arguing for repeal newspaper/broadcast cross-ownership rule and radio/TV cross-ownership rule but retention of the local TV multiple ownership rule and adopt new "10/10" rule); Cox Comments (arguing for repeal of the newspaper/broadcast cross-ownership rule yet retention of the national television ownership cap); *Comments of Belo Corp.* ("Belo Comments") (arguing for repeal of the newspaper/broadcast cross-ownership rule but retention of the "top four" limitation of the local TV multiple ownership rule).

[104] *See* discussion of certain proposals concerning the local TV multiple ownership rule *infra*, at Part IV.C.

such reformulated rules are "necessary in the public interest," which is the standard by which the Commission must judge.

A. The Conclusions of the *1984 Multiple Ownership Order* – That Elimination of the National TV Ownership Cap Will Further the Goals of Competition and Localism by Permitting Effective Competitors to Serve More Local Markets – Are Now More Compelling than Ever

Cox and NAB/NASA contend that the Commission ought to reverse its well-reasoned conclusion in the *1984 Multiple Ownership Order* that repeal of the national cap would be "at worst . . . inconsequential."[105] In fact, the modern media marketplace is so incredibly competitive and remarkably diverse that the Commission's reasons for repealing the national TV ownership cap are even more compelling today than they were in 1984.

Diversity. With respect to diversity, the Commission concluded in the *1984 Multiple Ownership Order* that:

> [a] national rule is irrelevant to the number of diverse viewpoints in any particular community and that even if we believed that radio and television were the only media relevant to diversity of viewpoint, the phenomenal growth in both television and radio since the rule was adopted in 1953 provides sufficient basis for raising the [ownership restrictions].[106]

On reconsideration of the *1984 Multiple Ownership Order*, the Commission elaborated on this position by "not[ing] that the most important idea markets are local . . . [and n]ational broadcast ownership limits . . . ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public."[107]

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105 *See 1984 Multiple Ownership Report*, at ¶ 61. *See also* Cox Comments, at 55-61; *Comments of The National Association of Broadcasters and The Network Affiliated Stations Alliance* ("NAB/NASA Comments"), at 66-71.

106 *1984 Multiple Ownership Order*, at ¶ 24.

107 *In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, ¶ 18 (1985) ("*1985 Multiple Ownership Reconsideration Order*") (*citing 1984 Multiple Ownership Order*, at ¶ 62).

The opponents of repeal of the national TV ownership cap recognize that they need to refute the sweeping and well-reasoned conclusions of the *1984 Multiple Ownership Order*. Yet, they attempt to do so with only rhetoric and unsupported assertions. For example, Cox suggests that the Commission's reliance in 1984 on cable as the prime "idea source" that would compete with broadcast stations is unfounded in today's market.[108] According to Cox, the broadcast networks' involvement in operating cable channels undermines cable's role as a competitor.[109] But the fact is that the vast majority of national cable channels are not co-owned with broadcast networks.[110] Study #12, moreover, concludes that broadcast television faces a continuing erosion of its viewership and audience share, and that the broadcasting share of video advertising revenues continues to drop, primarily due to competition from cable.[111] No serious observer can doubt that cable is a far stronger competitor – among both viewers and advertisers – to broadcasting today than the Commission ever could have anticipated in 1984.

Cox also argues that the Commission erroneously concluded in the *1984 Multiple Ownership Order* that the national television ownership cap has no bearing on the range of viewpoints to which citizens are exposed in their local media markets.[112] In this regard, Cox notes that the Commission acknowledged in the *1984 Multiple Ownership Order* that "ideas can migrate from one local market to another" and that – theoretically at least – "national

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108 Cox Comments, at 58.

109 *See id*. at 58.

110 *See generally, Video Competition Report*, at Appendix C.

111 *See* Jonathan Levy, Marcelino Ford-Livene and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, September 2002 ("Study #12"), at 134.

112 *Cox Comments*, at 57.

ownership rules might address this concern for the emergence of good ideas by preventing a single owner from echoing an identical voice in a large number of local markets."[113] Yet, Cox takes this argument out of context and fails to cite the Commission's conclusion. The Commission properly rejected this theoretical concern, noting that group owners do not impose monolithic viewpoints on their outlets.[114]

Cox suggests that the Commission's conclusion that group owners actually present a variety of viewpoints was erroneous because it was based only on editorial viewpoints expressed in news and public affairs programming to the exclusion of other programming. In other words, Cox apparently believes that if the Commission had taken into account the diversity of entertainment and other forms of programming in local markets, it would have concluded that the national television ownership cap was necessary to preserve diversity in these kinds of programming on the local level. But the Commission's conclusion – acknowledged and not rebutted by Cox – that group owners do not impose monolithic viewpoints on their media outlets applies with equal force to all forms of programming and locally as well as nationally. In short, the Commission properly concluded that elimination of the national television ownership cap posed no threat to viewpoint diversity, locally or nationally, despite Cox's mischaracterizations of the Commission's findings.

Localism. Both Cox and NAB/NASA argue that the Commission should retain the national cap because, in their view, network affiliates do a better job of responding to their local communities than network owned and operated stations ("O&Os").[115] In this regard,

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[113] *1984 Multiple Ownership Order*, at ¶ 61.

[114] *Id.*

[115] *See* Cox Comments, at 60-64; NAB/NASA Comments, at 68-70.

NAB/NASA submitted a study by Marius Schwartz and Daniel R. Vincent entitled *The Television National Cap and Localism*, which purports to demonstrate that the national TV ownership cap enables affiliates to outperform O&Os in meeting local needs.[116] In fact, the evidence developed in this proceeding, including Study #7 and EI Economic Study H, overwhelmingly demonstrates that O&Os are better at serving the needs of their local communities than are affiliates. *The Television National Cap and Localism* study does nothing to undermine this conclusion.

EI examined *The Television National Cap and Localism* and demonstrates that its conclusions cannot withstand scrutiny.[117] In particular, EI notes that a substantial portion of *The Television National Cap and Localism* is devoted to the relative profitability of networks versus affiliates but fails to address what should be a primary issue: whether the national TV ownership cap benefits consumers.[118] As EI argues – and the authors of *The Television National Cap and Localism* concede – repeal of the national TV ownership cap will increase network investment in programming.[119] Indeed, elimination of the national TV ownership cap will enable free, over-the-air television broadcast networks to afford programming that they otherwise might lose to cable, which enjoys a dual revenue stream (both advertiser and subscriber). Already, as NBC's reluctant relinquishment of its professional sports programming makes clear, it is becoming increasingly difficult for a television broadcast

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116 *See* NAB/NASA Comments, at Attachment 1.

117 *See* EI Economic Comments, at 2.

118 *Id.*

119 *Id.*

network to justify the substantial outlay involved in keeping certain programming on free television.[120]

The Television National Cap and Localism also focuses to a great extent on preemption by affiliates versus network O&Os and claims that the national TV ownership cap preserves localism by permitting affiliates to preempt the network feed to show programming that is more locally oriented.[121] As EI Study G demonstrated, however, neither affiliates nor O&Os preempt a significant amount of network programming. Moreover, it is by no means clear that the record of affiliate preemptions necessarily serves the interests of local viewers or, indeed, the public interest generally. The Walt Disney Company notes, for example, that many of its affiliates do not clear Disney/ABC's award-winning children's educational and informational programming during its regular time slot and instead broadcast syndicated or paid programming in its place.[122] According to The Walt Disney Company, "in Washington, DC, WJLA still interrupts Disney/ABC's children's programming so it can run part of the block early in the morning (when fewer kids are in the audience) and part of the block later in the morning (again, when fewer kids are in the audience) in order to run

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120 An increasing amount of high-cost sports programming is migrating to cable and away from free, over-the-air television. Just last year, the NBA moved the "bulk of its games" to cable after no broadcast network made a competitive bid for the rights package. And the aggregate television rights fees for the four major U.S. sports leagues exceed $3.5 billion per year, a 133 percent increase since 1990. *See* Stefan Fatsis, *NBC Sports Maps A Future Without the Big Leagues*, The Wall Street Journal, January 31, 2003, at A1.

121 *See The Television National Cap and Localism*, at 9.

122 *See Comments of The Walt Disney Company* ("Disney Comments"), at 4-5. The Disney/ABC facts concerning preemption by affiliates to replace award-winning children's programming with syndicated or paid programming also undermines the suggestion by American Federation of Television and Radio Artists, Writers Guild of America, East that the national TV ownership cap is necessary to promote quality children's and educational programming. *See* AFTRA Comments, at ¶ 126. These commenters fail to document any link between the national TV ownership cap and the availability of quality children's programming.

paid programming in the preferred time slot (when the most kids are in the audience)."[123] In any event, given the insubstantial amount of affiliate preemptions, which "clearly do not result in any significant exercise of the power to choose," EI properly concludes that "[t]o sacrifice consumer welfare to th[e] trivial end" of granting flexibility to affiliates "would be extraordinarily bad public policy."[124]

Like the issue of preemption by affiliates versus O&Os, the comparative record of O&Os and affiliates with respect to news and public affairs programming also demonstrates that the national TV ownership cap is not necessary to achieve the Commission's localism policy goal. As shown in EI Economic Study H, O&O stations carry significantly more minutes of local news and public affairs programming than affiliates and O&O stations earn at least as many awards as affiliates for news quality.[125] In this regard, the arguments of Dean Baker in *Democracy Unhinged*, submitted with the CWA Comments, should give the Commission no pause. Baker suggests that if one controls for the age of stations, the results of Study #7 concerning the output of news by O&Os versus affiliates – which are supported by EI Economic Study H – are undermined.[126] EI has conducted its own independent analysis of this precise issue and found that, even controlling for the age of stations, the results of Study #7 and EI Economic Study H concerning news output remain entirely reliable: O&O stations carry significantly more minutes of local news and public affairs

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[123] Disney Comments, at 5.

[124] *See* EI Economic Comments, 3.

[125] *See* Joint Comments, at 38. *See also EI Economic Study H, News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations* ("EI Economic Study H"), attached as an Exhibit to the Joint Comments.

[126] *See Democracy Unhinged*, at 8.

programming than affiliates.[127] In any event, Baker has merely offered criticisms of others' studies, but has not presented any evidence or analysis sufficient to meet the heavy burden facing those who oppose deregulation. In addition, the theoretical argument that affiliates might have a better sense of the local market than a network-owned station fails for two reasons: (i) most affiliates are not locally owned;[128] and (ii) there is no reason to think that a network would not be concerned with the interests of local markets in which it has spent millions of dollars to acquire television stations.

Competition. Cox once again misses the mark when it argues that the Commission should retain the national cap in order to preserve competition in local markets.[129] The competitive concerns raised by the Commission in the *Notice* focus on the *national* program production market and *national* advertising market, and the Commission acknowledges in the *Notice* that its national ownership rules "require[] that the relevant market be a national broadcast market for viewers and listeners."[130] Thus, Cox's focus on the effect of the national TV ownership cap on competition in local markets is misplaced.

With respect to competition in the national program production market, the Commission seeks comment on whether raising the national cap would "facilitate

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127 *See* EI Economic Comments, at 28.

128 *See* Joint Comments, at 38 (noting, for example, that Gannett Broadcasting owns stations across the country but is headquartered in McLean, Virginia).

129 *See* Cox Comments, at 67.

130 *See Notice* at ¶¶ 138, 142, n.226 (*citing Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 95 F.C.C.2d 360, 386 (1983)). Indeed, the only local competition question the Commission raises in the *Notice* is whether the national TV ownership cap prevents "especially skilled" group owners from entering additional local markets, thereby impeding competition in local advertising markets. *See Notice* at ¶ 145.

monopsony power."[131] As EI Economic Study E demonstrated, however, the purchase of video programming at the national level (with an HHI of 1120) is at the lower end of the "moderately concentrated" range defined in the Merger Guidelines.[132] The study included broadcast networks as well as syndicators, cable networks, DBS operators, pay-per-view providers and distributors of videocassettes and DVDs as part of the national video entertainment programming market, since each of these media are accessible to the vast majority of American consumers and constitute alternatives to programming on broadcast stations.[133]

Moreover, even if the Commission found some basis for believing that broadcast networks have some monopsony power, the current 35 percent limit bears no relationship to the theoretical harm to program producers. Thus, the Commission, in seeking to protect cable programmers from foreclosure, adopted a horizontal ownership limit which bars a cable operator from having an attributable interest in more than 30 percent of national subscribers to MVPDs.[134] In contrast, the national TV ownership cap is based on the number of households in markets where a broadcaster own stations. As a result, the national TV ownership cap greatly overstates possible market power since "audience reach," as defined, bears no relation to the broadcaster's actual viewing audience, unlike the cable horizontal

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131 *Notice* at ¶ 140.

132 *EI Economic Study E, Concentration Among National Purchasers of Video Entertainment Programming* ("EI Economic Study E"), attached as an Exhibit to the Joint Comments, at 1. The Department of Justice routinely approves mergers that occur in modestly concentrated markets.

133 *See* EI Economic Study E, at 2 ("It is the presence of these alternative delivery systems and their ability rapidly to take dissatisfied viewers away from broadcast television that is important, not their present scale of operation.").

134 *See In Re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits,* 14 FCC Rcd 19098 (1999).

cap, which is based on actual subscribers. In addition, in vacating the cable horizontal ownership limit, the D.C. Circuit concluded that the Commission's 30 percent benchmark for actual subscribers was far too low; the Court strongly suggested that the Commission could not justify a limit of less than 60 percent.[135] In any event, the record is devoid of evidence supporting the conclusion that a national TV ownership cap – at any level – is necessary to protect the program production market.

Oddly, Cox also faults the networks for taking advantage of their statutory retransmission consent rights.[136] Cox does not explain, however, how exercise of these rights poses any threat to the public interest, which is hardly surprising, since Cox itself takes full advantage of its retransmission consent rights.[137] To the degree that Cox suggests that elimination of the national TV ownership cap would enhance networks' bargaining power vis-à-vis their competitors, the Joint Comments pointed out that the Commission has long since abandoned the role of arbitrating commercial disputes or acting as the guarantor of the economic welfare of individual businesses.[138]

In sum, the Commission was correct in 1984 when it determined that repeal of the national television ownership cap would have "inconsequential" results and the intervening two decades only reinforce that the national TV ownership cap is not necessary to serve any

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[135] *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001).

[136] *See* Cox Comments, at 41-47.

[137] *See* Linda Moss, *Must-See Retrans Spat: Small Ops Vs. Cox TV*, Multichannel News, January 20, 2003 (noting the American Cable Association's claim that Cox has been "unreasonable and recalcitrant" in negotiating retransmission consent deals with rural cable systems).

[138] *See* Joint Comments, at 39. *See also 1984 Multiple Ownership Report*, at ¶ 107, n. 130 (FCC noting that "we are not in the business of subsidizing non-network groups . . . .").

of the Commission's policy goals. Accordingly, no limit on national ownership is necessary to protect the public interest.

B. The Dual Network Rule, Which Bears Little If Any Relationship to Localism, Fails to Serve the Commission's Diversity and Competition Goals and Therefore Should Be Repealed

NAB/NASA and others ask the Commission to pretend that the media marketplace has not changed in the past 60 years since the time when the dual network rule was first imposed – and only two radio networks existed – and to retain the dual network rule.[139] As the Joint Commenters have described – and as every person in this country knows – the modern media marketplace is extraordinarily diverse and competitive and bears little resemblance to the media world 60 years ago. When analyzed against the backdrop of the modern media marketplace, it is apparent that the dual network rule is not necessary to achieve any of the Commission's policy goals and, therefore, must be repealed.

Diversity. NAB/NASA argue that the dual network rule is necessary to protect program diversity because repeal of the financial interest and syndication ("fin-syn") rules has created a "network funnel" through which national television broadcast programming must pass.[140] This position hardly can be justified in light of the enormous expansion of programming channels delivered to viewers through MVPDs. As the Joint Comments noted, Study #12 demonstrated the extraordinary competition for viewers broadcast networks face from the programming channels available on cable and DBS, which viewers treat as ready substitutes in the provision of programming.[141]

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139 AFL-CIO Comments, at 60-62; Children's Now Comments, at 3; NAB/NASA Comments at 71-80.

140 NAB/NASA Comments, at 78.

141 Joint Comments, at 45.

AFL-CIO, for its part, makes no link – empirical or theoretical – between the dual network rule and news programming and yet claims that relaxation of the dual network rule has diminished diversity in news programming.[142] AFL-CIO then proceeds to clothe this straw man with mere anecdotes concerning the supposed poor performance in news output by certain networks.[143] Attached to the Joint Comments were News Programming Exhibits that set forth in exhaustive detail the performance of Fox, NBC/Telemundo, and Viacom with respect to news and public affairs programming, and these Exhibits demonstrate a record that is nothing short of superlative. Accordingly, the Commission should disregard in all respects AFL-CIO's unsubstantiated argument concerning the supposed detrimental effect on news programming that would result from repeal of the dual network rule.

Competition. NAB/NASA acknowledge "the continuing erosion of network television audience attributable to the growth of cable and DBS viewership," and yet claim that the dual network rule is necessary to curb the supposed market power of networks.[144] A rule that is merely duplicative of antitrust law cannot possibly satisfy the dictates of Section 202(h). Indeed, as noted in the Joint Comments, the Commission focuses its analysis of competition issues vis-à-vis the dual network rule on the "program production market" and the "national television advertising market,"[145] which are precisely the type of economic markets Dr. Owen has argued will be fully protected through proper application of antitrust laws. Accordingly, the dual network rule is not necessary to serve the Commission's

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142 AFL-CIO Comments, at 60.

143 *Id.* at 61.

144 NAB/NASA Comments, at 74, 76.

145 *Notice* at ¶ 166.

competition goal and NAB/NASA's comments have done nothing to undermine that conclusion.

Localism. The Commission has acknowledged that it does not focus on localism as a policy goal *per se* for the dual network rule.[146] Nevertheless, NAB/NASA claim that the dual network rule is necessary to promote the Commission's localism goal, and yet they cite no empirical or even theoretical demonstration that the dual network rule serves any localism interests, real or imagined. The unsubstantiated claims of NAB/NASA and others that the dual network rule is necessary to serve the Commission policy goal of localism plainly do not rebut the deregulatory presumption of the 1996 Act.

Given that none of the opponents of deregulation present evidence to overcome the burden to demonstrate that the dual network rule is necessary to serve the Commission's diversity, competition or localism goals, the dual network rule must be repealed.

C. The Local TV Multiple Ownership Rule's Narrow Focus On Broadcasters Is Arbitrary, Unjustified and Unsustainable In Light of Both the Economic Theory and Empirical Evidence that Compel Its Repeal

The Joint Commenters demonstrated that the local TV multiple ownership rule sweeps far too broadly in attempting to preserve viewpoint diversity and competition in local markets. First, the local television market is ferociously competitive. Cable operators compete daily with television broadcasters for programming, viewers and local and national advertisers. With regard to broadcast television alone, there are at least seven national English-language networks and two Spanish-language networks. Second, both economic theory and empirical evidence have established the proposition that owners of multiple local outlets have incentives to diversify their programming and viewpoints, and the Commission

146 *Id*. at ¶ 168.

has not been presented with any evidence sufficient to challenge this proposition. Instead, several commenters have made unsubstantiated assertions that common ownership of local TV stations has resulted in public interest harms. There is ample data, however, demonstrating that common ownership yields increased diversity without threatening competition, and therefore advances the Commission's policy goals.

Indeed, EI Economic Study B concluded that "[s]tations that are part of commonly owned local station group . . . are significantly more likely to carry local news than other stations, even after controlling for other factors."[147] Moreover, EI Economic Study B found that "the higher the number of stations owned by the same owner, the more likely it is that the owner's stations offer news programming."[148] These findings belie the UCC Comments' assertion that "[c]ommon ownership . . . reduces the amount and variety of local programming . . .,"[149] as well as CFA's unsupported assumption that "outlets that are commonly owned are less likely to provide diverse points of view."[150] The EI Economic Comments point out that CFA attempts to cite "various sources to demonstrate that '[e]mpirical evidence clearly suggests that concentration – fewer independent owners – in media markets has a negative effect on diversity.'"[151] EI notes, however, that "the studies [CFA] cites either fail to consider diversity or concentration at all, or offer no empirical

147 *EI Economic Study B, Effect of Common Ownership or Operation on News Carriage, Quantity and Quality* ("EI Economic Study B"), attached as an Exhibit to the Joint Comments, at 2. EI accounted for such "other factors" as the size of the DMA, demographic information about the residents of the DMA and the types of and penetrations rates of other media in the DMA.

148 EI Economic Study B, at 7-8.

149 UCC Comments, at 40.

150 CFA Comments, at 89.

151 *See* EI Economic Comments, at 4-6.

evidence."[152] Moreover, as the Joint Comment showed, the Commission has long accepted the principle – supported by a wealth of economic data – that single owners of multiple media outlets have financial incentives to diversify their program offerings.[153] The unsubstantiated fears of CFA and others do nothing to undermine the truth of the FCC's conclusions.

In addition, the Commission's decision to establish an overly narrow voice test – including only broadcast outlets – represents unjustified and arbitrary line-drawing. As the Joint Commenters pointed out, a rule, like the local TV multiple ownership restriction, that utilizes an irrational market definition cannot be sustained under Section 202(h). Thus, the rule currently permits a single entity to own two television stations in a market with a total of only nine independently-owned television stations (or 22 percent). Paradoxically, the rule absolutely bars a single entity from owning three television stations in markets with a total of 14 or 18 or even 25 independently-owned television stations – though such common ownership would constitute as little as 12 and not more than 21 percent of the independent television outlets. Similarly, any rule that treats the ownership of three stations in large markets as being different in kind than common ownership of two stations in small or medium markets must be rejected as arbitrary. By including in its market definition only television stations, to the exclusion of all other available media, and by failing to account for the actual size and competitiveness of the relevant market in setting a hard cap, the rule prohibits mergers (and potential efficiencies that would benefit the public interest) regardless of whether there is any actual evidence of consumer harm.

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152 *Id*.

153 *See* Joint Comments, at 51.

As the local TV multiple ownership rule unjustifiably penalizes broadcasters, it is the very embodiment of arbitrary decision-making. Any attempt to delineate a market definition by relying on speculation, rather than an evaluation of actual consumer behavior, would be equally arbitrary. Inasmuch as the proposed local television rules put forth by some commenters in this proceeding also fail to account for marketplace realities, those proposals should be rejected.

For example, NAB's proposal that the Commission adopt a "10/10" local television multiple ownership rule that evaluates potential mergers only by accounting for television stations cannot pass muster.[154] NAB's proposed rule would allow a single entity to own two television stations in a market if both stations had year-long daily viewing shares of 10 percent or less (and also would allow common ownership as long as only one of the station's shares was over 10 percent). The Comments of Coalition Broadcasters endorse the "10/10" proposal, but suggest raising the threshold to 12 or 15 percent.[155] Neither the NAB's nor the Coalition Broadcasters' proposals, however, provide any justification for defining the relevant market to include only television stations, nor are they responsive to the size (and competitiveness) of the local market. Likewise, UCC, which would use a TV-only voice test as part of a local TV multiple ownership rule, fails to justify its narrow definition of the relevant market.[156]

Belo Corp.'s proposal – urging the Commission to eliminate the "eight independent voices" condition but retain the "top four" limitation of its current local TV multiple

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154 *See* NAB Comments, at 79.

155 *See Comments of Coalition Broadcasters, Lin Television Corporation, Raycom Media, Inc., Waterman Broadcasting Corporation, and Montclair Communications, Inc.* ("Coalition Broadcasters Comments"), at 12.

156 *See* UCC Comments, at 42-43.

ownership rule – fares no better.[157] While offering no rationale for its proposal, Belo suggests that retaining the "top four" limitation, "together with enforcement of the antitrust laws," would provide "protection against excessive consolidation in individual local markets."[158] The "top four" limit, however, is itself a proxy for market share, and as the Joint Commenters have shown, application of the Merger Guidelines would provide a far more accurate, more dynamic and less arbitrary means of preventing undue concentration. The local TV multiple ownership rule is also rooted in the incorrect belief that only stations ranked in the top 4 carry local news. In fact, the Joint Comments showed that numerous stations not ranked in the top 4 carry local news, and that the average household in the United States lives in a DMA with 6.1 sources of local TV news.[159]

Ultimately, all of these proposals suffer from the same defects as the current local TV multiple ownership rule, namely perpetuation of arbitrary and unjustifiable boundaries separating broadcasting from other media and hard caps regardless of the competitiveness of the relevant market.

D. Given the Incentives for Common Owners of Newspapers and Broadcast Outlets to Express a Wide Variety of Viewpoints, the Newspaper Broadcast Cross-Ownership Rule Must Be Repealed

None of the Commission's existing media ownership restrictions elicits more calls for repeal than the newspaper/broadcast cross-ownership rule ("NBCO rule").[160] The question

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157 *See* Belo Comments, at 14. (Belo also argues for elimination of the newspaper/broadcast cross-ownership rule. *See id*., at 2).

158 *Id*. at 14.

159 *See* Joint Comments, at 51; *see also EI Economic Study A, News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations*, attached as an Exhibit to the Joint Comments.

160 *See, e.g.*, *Comments of Block Communications, Inc.*, Belo Comments, Bonneville Comments, *Comments of Canwest Global Communications Corporation*, Clear Channel Comments, Cox

for the Commission, then, is not *whether* the rule should be repealed but *when*. In this regard, Tribune's proposal that the Commission carve out the NBCO rule and issue a separate decision dispensing with the rule *prior* to resolution of the omnibus proceeding should not be adopted.[161] As noted above, Section 202(h) of the 1996 Act demands consistency in reasoning and outcome for all of the Commission's media ownership restrictions. Carving out the NBCO rule – or any other rule for that matter – risks introducing inconsistent treatment among the various media ownership restrictions. Indeed, the Commission initiated the omnibus proceeding and incorporated the comments of all interested parties on the NBCO rule – which is already the subject of a separate, pending proceeding – in large part to maintain the requisite consistency in treatment among its media ownership restrictions.[162] Accordingly, the Commission must stay the course and decide as expeditiously as possible the fate of *all* existing media ownership restrictions in the current omnibus proceeding and not single out the NBCO rule for special treatment.

Tribune is certainly correct, however, to argue that the NBCO rule is counterproductive by failing to account for the overwhelming evidence that commonly-owned newspapers and broadcast stations do not speak with a single, monolithic voice.[163] Indeed, Study #2 demonstrated as much when it found that "common ownership of a

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Comments, *Comments of Dispatch Broadcast Group*, Gannett Comments, *Comments of Hearst Corporation*, *Comments of Media General, Inc.*, Morris Comments, *Comments of Paxson Communications Corporation* ("Paxson Comments"), *Comments of The Tribune Company* ("Tribune Comments"), *Comments of West Virginia Media Holdings, LLC*.

161 Tribune Comments, at 3-4.

162 *See Notice* at ¶ 7. *See also In Re Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy,* 16 FCC Rcd 17283 (2001) ("*NBCO Proceeding NPRM*").

163 Tribune Comments, at 9. *See also* Joint Comments, at 54.

newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary on important political events between the commonly owned outlets."[164] And contrary to the claims of AFTRA and the AFL-CIO, the study is not "deeply flawed."[165] AFL-CIO cites mere anecdotes about a unique situation that arose in a foreign country to suggest that the Commission should dismiss the sound results of Study #2 and retain the NBCO rule.[166] And AFTRA does not produce any independent analysis to contradict Study #2 but merely plays the role of gadfly by nit-picking at certain design issues behind the study.[167] As EI notes, any empirical study is subject to some analytic interpretation.[168] AFTRA's barbs against Study #2, however, do nothing to undermine the overall thrust of the study's conclusions: single owners of multiple media do not speak with a single, monolithic voice.

In light of the clear evidence that repeal of the NBCO rule will advance the Commission's policy goals, the Commission should not adopt the proposal of Entravision Holdings LLC to require common owners of newspapers and broadcast outlets to certify periodically "that they have not been engaged and will not be engaged . . . in anticompetitive behavior."[169] Entravision's proposal is wholly unnecessary because, as Tribune points out,

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164 David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, (September 2002) ("Study #2), at 11.

165 AFTRA Comments, at ¶ 84; AFL-CIO Comments, at 44.

166 AFL-CIO Comments, at 44-45 (describing anecdotes about events in Canada).

167 AFTRA Comments, at ¶ ¶ 84-89 (*citing Democracy Unhinged*, at 5-7).

168 *See* EI Economic Comments, at 16.

169 *Comments of Entravision Holdings, LLC*, at 9.

even after the NBCO rule is repealed antitrust and competition laws are more than sufficient to address any competition issues that may arise.[170]

In sum, the NBCO rule should be repealed at the conclusion of this proceeding along with all other media ownership restrictions, and the Commission need not adopt any behavioral safeguards to address theoretical concerns regarding competition issues, which are more than adequately address by antitrust laws.

E. No Evidence Presented in the Record Undermines the Findings of the FCC *Ownership Studies*, Which Confirm that Elimination of the Local Radio Ownership Rule Will Advance the Commission's Policy Goals

As the Joint Comments noted, several of the *Ownership Studies* provide strong support for repeal of the local radio ownership rule.[171] Study #4, for example, analyzed the effect of local and national radio concentration on real advertising rates between 1996 and 2001, and concluded that national concentration did not affect local advertising prices and that a greater presence of large national owners in a local market tends to *lower* advertising prices.[172] As for diversity, Study #9[173] and Study #11[174] both indicated that programming diversity has not been adversely affected by radio consolidation since the adoption of the 1996 Act.

The Future of Music Coalition ("FMC") provides the results of its own study which it believes suggests that "traditional measures that indicate that format variety has increased do

[170] Tribune Comments, at 17.

[171] Joint Comments, at 55-57.

[172] Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets*, September 2002, at 2, 18 ("Study #4").

[173] *See* George Williams, Keith Brown, and Peter Alexander, *Radio Market Structure and Music Diversity*, September 2002 ("Study #9").

[174] *See* George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance*, September 2002 ("Study #11").

not support that programming diversity has increased."[175] FMC introduces the concept of "programming diversity" as an attempt to describe a greater "diversity in songs, artists and viewpoints," which it believes is more important than format diversity *per se*.[176] While the FMC study superficially appears to cast doubt on the results of the *Ownership Studies* described above, on closer examination the study says much but proves little.

First, the FMC study suggests that self-reported formats would be more descriptive than BIA format categories, because self-reporting permits finer distinctions among formats.[177] The use of a third party such as BIA to categorize radio formats, however, is inherently more reliable and, hence, susceptible to the kind of rigorous analysis the Commission needs to support its actions in this proceeding. Second, FMC expressly acknowledges that "consolidation is the most likely cause" for the *large increase in format variety* that occurred from 1996 to 2000, or "the first four years of consolidation."[178] FMC then bemoans the fact that format variety is no longer increasing at the same rapid pace. The Joint Commenters submit that it is more than just "theoretical" that format increased during this time period because, as FMC states, "deregulation allowed parent companies to employ different radio formats in a single market in order to capture multiple audiences using the different formats."[179] In other words, the FMC study, rather than casting doubt on the

[175] *Comments of The Future of Music Coalition* ("FMC Comments"), at 51-52.

[176] *Id.* at 42.

[177] *Id*. at 44.

[178] *Id.* at 45.

[179] *Id.* at 46.

Ownership Studies, provides further support that repeal of the local radio ownership rule will not have a detrimental impact on radio consumers.[180]

With respect to competition issues, Study #4, as noted above, concluded that national concentration in radio has not affected local advertising prices and that a greater presence of large national owners in a local market tends to *lower* advertising prices. Similarly, a study conducted by Professor Jerry A. Hausman demonstrates that rises in radio advertising rates should not be attributed to consolidation in the radio industry.[181] Nonetheless, in *Democracy Unhinged*, Dean Baker suggests that the real price of radio advertising was falling for three decades before the 1995-2000 period and that the failure of Study #4 to include a longer time period limits its usefulness.[182] EI obtained media cost per thousand indices from Universal McCann Media, the same source relied upon by Dr. Baker. EI notes that these data are inconsistent with the claim by Dr. Baker that radio advertising prices fell in real terms over the entire period from 1961-1994.[183] EI conducts an independent analysis of the data and concludes that "Dr. Baker has presented no evidence to contradict [Study #4]'s finding that only 3 percent of the real increase in radio advertising rates from 1996 to 2001 is due to factors other than economic growth."[184] Again, however, regardless of the data, Baker's

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180 The Commission should not be misled by the claim by Dean Baker in *Democracy Unhinged* (at iii), that Study #9 concluded that song diversity has decreased since 1996; Study #9 concluded just the opposite, which Mr. Baker acknowledges in *Democracy Unhinged* (at 2). While Study #9 concluded that playlists for stations within the same format became slightly more uniform across local markets, "listeners in local radio markets may have experienced increasing song diversity even absent an increase in R&R radio formats." Study #9, at 18.

181 *See* Hausman Statement, at 2.

182 *Democracy Unhinged*, at iv.

183 *See* EI Economic Comments, at 18.

184 *Id*. at 20.

criticisms fall far short of meeting the burden imposed by Section 202(h) on those opposing deregulation.

In sum, the record now before the Commission provides compelling evidence that elimination of the local radio ownership rule poses no threat to the Commission's policy goals and, on the contrary, likely will advance those goals.

F. The Radio/TV Cross-Ownership Rule Must Be Eliminated in Light of the Plethora of Voices Present in the Modern Media Marketplace

While many commenters argue that the Commission ought to retain all media ownership restrictions and, hence, the radio/TV cross-ownership rule should be retained as well,[185] very few parties attempt to address directly the merits of the rule. As the Joint Commenters argued in their comments, given the number of outlets available in today's media marketplace, the rule is not necessary to serve any of the Commission's policy goals and should be repealed.[186]

Buckley Broadcasting Corporation ("Buckley") urges the Commission to "go slow" in allowing further cross-media combinations because the "current ownership proscriptions have been in place for barely three years."[187] As noted above, such dilatory, wait-and-see approaches cannot be justified in light of the requirements of Section 202(h).

The suggestion of Paxson – which likely would resonate with Buckley[188] – that the Commission ought to apply heightened scrutiny to radio/TV combinations that would control 50 percent or more of the combined advertising revenue in a given DMA is a prescription for

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185 *See, e.g.*, NOW Comments; AWRT Comments.

186 *See* Joint Comments, at 58.

187 *Comments of Buckley Broadcasting Corporation* ("Buckley Comments"), at 2.

188 *See* Buckley Comments, at 5 (FCC should adopt an approach similar "to the approach taken by DOJ").

inefficient use of government resources.[189] As Dr. Owen has noted, advertising markets are precisely the kind of markets already subject to direct application of antitrust and competition laws, and therefore, the Commission can repeal the radio/TV cross-ownership restriction and still rest assured that its competition policy goal will be realized.

In sum, the time to act on the radio/TV cross-ownership rule is now and it should be repealed.

V. THE COMMISSION SHOULD INITIATE A NEW PROCEEDING DEVOTED TO ADVANCING THE PARTICIPATION OF MINORITIES AND WOMEN IN THE MEDIA

With regard to the recommendations of Diversity and Competition Supporters, the National Association of Black Owned Broadcasters ("NABOB"), the National Organization for Women ("NOW"), and others, the Joint Commenters share their overriding goal of minority and female ownership in the media and applaud their efforts to propose numerous creative solutions to this very challenging and important issue. Diversity and Competition Supporters, for example, suggests a number of laudable "market-based incentive programs" that the Commission should consider as ways to increase minority and female ownership, including the use of tax relief certificates and the creation of "incubator programs" to encourage sales of broadcast stations to minority and female owners.[190] Similarly, NOW urges the Commission to recognize that "[p]romoting ownership opportunities for women, minorities and small businesses is a congressionally mandated goal" that should be one of the Commission's explicit objectives.[191]

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189 Paxson Comments, at 35.

190 Diversity Comments, at 102-115.

191 NOW Comments, at 9.

Each of these groups has raised important policy concerns, and the Joint Commenters believe that the Commission should consider their ideas in a separate proceeding. However, the fact that the concerns of NOW, NABOB, the Diversity and Competition Supporters and others remain despite years of intrusive structural ownership regulation of the media underscores the importance of addressing minority and female ownership initiatives through a separate proceeding focused precisely on these issues. Indeed, in the *1984 Multiple Ownership Report*, the Commission recognized that ownership rules were not "designed to foster minority ownership in the broadcasting industry and ha[ve] not yielded such an effect."[192]

The Joint Commenters would support an FCC effort to explore through a separate proceeding the proposals put forth by the Diversity and Competition Supporters, NABOB, NOW and others. In fact, the Joint Commenters already are working toward that goal as part of a coalition that actively supports tax relief certificates. In addition, Fox and Viacom are founding contributors to the Quetzal/JP Morgan Partners private equity fund, whose mission is to increase ethnic and gender diversity in the management and ownership of U.S. communications companies. Nonetheless, the strict requirements of Section 202(h) require that the Commission act promptly to complete its biennial review obligations, and do not permit the opportunity to thoroughly examine minority and female ownership issues in this proceeding.

192 *See 1984 Multiple Ownership Report*, at ¶ 93.

VI. RESURRECTION OF ANY ASPECT OF THE FINANCIAL INTEREST AND SYNDICATION RULES IS WHOLLY UNNECESSARY IN VIEW OF THE OVERWHELMING EVIDENCE THAT THE RULES HARMED DIVERSITY

Despite findings by both the U.S. Court of Appeals for the Seventh Circuit and the Commission that the fin-syn rules produced exactly the opposite of the intended result, two commenters, the Coalition for Program Diversity ("Coalition") and The Writers Guild of America ("Writers Guild"), propose a resurrection of these requirements in significant respects. The Joint Commenters submit that the reasons that led to repeal of the rules in 1993 are even more compelling today in light of the dramatic changes that have taken place in the television marketplace during the intervening years. The Coalition and Writers Guild comments, moreover, are relevant to none of the issues raised in the *Notice* and should be dismissed.

A brief review of the history of the Commission's fin-syn restrictions and an examination of the current program production market convincingly demonstrate that revival of the fin-syn requirements would be counterproductive. The Commission originally adopted the rules in 1970 to curb what it perceived as the "excessive" power of the three major broadcast networks.[193] In 1970, there were three broadcast networks, cable was in its infancy and DBS did not exist. The Commission's rules, later replicated and enforced by the parameters of consent decrees between the networks and the U.S. Department of Justice ("DOJ"), were based on the Commission's belief that the networks would attempt to control the programming market to eliminate and forestall any future competition on the distribution

[193] The rules specifically prohibited a broadcast network from (i) syndicating programs produced by the network for rebroadcast by independent televisions stations, (ii) purchasing syndication rights to programs it obtained from outside producers, or (iii) obtaining any other financial stake in such programs.

side.[194] Seeking to strengthen independently-owned stations vis-à-vis the networks, the Commission mistakenly believed that the rules would secure these stations against having to purchase syndication rights from the networks.

The Commission began a comprehensive review of its fin-syn rules in 1990 in response to a petition by Fox.[195] While acknowledging that dramatic changes had occurred in the television industry in the intervening 20 years, the Commission nonetheless concluded that the networks still exerted some level of market domination necessitating retention of modified fin-syn rules. The Commission also imposed an entirely new regulation with no counterpart in the original fin-syn rules, requiring the broadcast networks to purchase at least 40 percent of their prime time programs from independent producers. The 40 percent carve-out differed from a condition contained in the DOJ's consent decrees which required the networks to limit the hours of network-owned programming aired during the prime time schedule. The DOJ not only *supported elimination* of the FCC's fin-syn requirements in its comments during the Commission's review, it specifically objected to the 40 percent carve-out.[196]

The U.S. Court of Appeals for the Seventh Circuit vacated the Commission's revised fin-syn regulations on appeal, determining that the Commission had wholly failed to justify the rules in light of dramatic changes in the television marketplace that obviated any need for the rules. Writing for the court, Judge Posner observed that "profound" change had taken place in the industry and noted that the networks had "lost ground" in the preceding 15 years

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194 *See Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) ("*Schurz*").

195 *See In the Matter of Evaluation of the Syndication and Financial Interest Rules,* Report and Order, MM Docket No. 90-162 (rel. May 29, 1991) ("*1991 Report and Order*").

196 The Department of Justice's consent decrees were completely lifted by 1993.

as a result of the "rapid growth" of the cable television industry.[197] Given these marketplace developments, the court questioned the justification and wisdom of further restraining the networks' competitive ability through the continuation and augmentation of the fin-syn requirements. The court's analysis also labeled as "never very clear" the Commission's original reasoning in adopting the fin-syn rules: that the broadcast networks would somehow leverage their distribution "monopoly" into the production market. Indeed, the Court in *Schurz* determined that "contrary to the intention behind the rules, yet an expectable result of them because they made television production a riskier business," the production of prime time programming under the fin-syn rules had become *more* concentrated.[198]

In 1993, the Commission greatly scaled back most of its fin-syn restrictions in response to the *Schurz* Court's ruling and also ordered the gradual sunset of the few remaining restraints (which occurred without fanfare in 1995).[199] It recognized that the decline in network market share had continued unabated even in the short period since adoption of the revised rules due to the emergence of alternate programming options including the burgeoning cable industry. Agreeing with the *Schurz* Court's conclusion, the Commission determined that these competitive alternatives served to "limit[] a network's ability to control the market or dictate prices for prime time entertainment programs."[200] Citing Judge Posner's analysis, the Commission concluded that the rules had proven

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197 *See Schurz*, 982 F.2d at 1046, 1053.

198 *See Id*. at 1046.

199 *See In the Matter of Evaluation of the Syndication and Financial Interest Rules, Second Report and Order*, MM Docket No. 90-162 (rel. May 7, 1993) ("*1993 Report and Order*"). The *1993 Report and Order* immediately removed the restrictions on network acquisition of financial interests and syndication rights in network prime time programming and the 40 percent cap on network in-house productions. Other restrictions were phased out more gradually. *See id.* at ¶ 12.

200 *See id*. at ¶45.

ineffective as the production community had actually become increasingly concentrated under the fin-syn regime. In other words, far from aiding small independent producers, the rules favored those companies with pockets deep enough to withstand the high risks of producing entertainment programming for prime time network television. As a result, the Commission eliminated the fin-syn restrictions, concluding that financial involvement by the networks increased the chances "that this type of small producer can obtain financing."[201]

Notwithstanding the unfortunate results of government interference in the program production market, the Coalition now urges the Commission to revive the fin-syn rules by requiring networks to reserve 25 percent of their prime time schedule for independently-produced prime time television programming. The Writers Guild suggests a 50 percent requirement. These proposals would also prevent the networks from taking any financial interest or domestic syndication rights in programs subject to the carve-out.[202] According to the Coalition, independently-produced programming aired on the prime time schedule for the Big 4 networks (ABC, CBS, FOX and NBC) has declined from 68 percent in 1992 to 24 percent today.[203]

In fact, the Coalition paints a picture of the program production market that bears no relationship to reality. Examination of the data on which the Coalition relies demonstrates that it greatly understates the current role of independent production companies in prime time programming. For example, the Coalition's calculations (contained in Appendix E to its comments) include as "network-produced" those programs provided by studios affiliated

201 *Id*. at ¶ 51.

202 Coalition Comments, at 9.

203 *Id.* at 4.

with another network. These programs clearly should be excluded from network-produced programming since the producer is entirely independent of the exhibiting network. Moreover, the Coalition includes news and sports programming in its computations which makes no sense since there is no syndication market for these programs. And surely the Commission would not adopt a rule which penalizes networks from presenting informational programming in prime time. In any event, when shows produced by studios affiliated with another network and news/sports programs are excluded, the level of network-owned programming, based on the Coalition's data, drops from 76 percent to 60 percent for the 2002-2003 season.

More importantly, the Coalition treats as network owned any program which is co-owned with an independent producer. Precisely as the *Schurz* Court and the Commission predicted, elimination of the rules made available to independents the capital resources of the networks, enabling them to break into the prime time schedule. When co-productions are excluded (along with news/sports and other network productions), the networks produced only 35 percent of the 2002-2003 prime time season.[204]

As these calculations prove, the *Schurz* Court and Commission correctly predicted that market forces better ensure program diversity. Through cost sharing agreements with networks, independent producers are better able to undertake the enormous risk of new

[204] The Coalition has also exaggerated the percentage of shows produced by independents for the 1992-1993 season. In fact, the majority of the shows in the 1992-1993 network schedule were produced not by independents, but by production companies associated with one of the seven major studios. Analysis of Appendix G to the Coalition Comments reveals that 43 percent of the networks' programs were produced by major studios or their subsidiaries (Lorimar and HBO Independent, for example, were both subsidiaries of Warner Brothers.). Furthermore, as evidenced by their copyright ownership, the major studios provided financing for and maintained control over an additional 13 percent of the programs that the Coalition Comments attribute to nominally independent producers. Thus, a total of 56 percent of the programs in the 1992-1993 network schedule were owned or supplied by the major studios.

productions. The Coalition's suggestion that non-network financing for independents will magically appear to fill the gap if a 25 percent carve-out is imposed defies both logic and the painful history of the rules.[205]

The Coalition also ignores the acceleration of market trends that the *Schurz* Court identified in 1992 and the Commission acknowledged in 1993. As the Joint Commenters demonstrate in their opening comments, with the continued growth of cable and DBS, the broadcast networks now face even greater competition from an array of programming alternatives. In fact, cable continues to erode the networks' share of the viewing audience.[206] In addition, the Coalition ignores the "weblets" – the WB and UPN networks – contending that shows aired on the WB and UPN have to date had limited success in syndication.[207] Irrespective of the syndication record of UPN and WB shows, these networks, as well as cable networks, have profoundly changed the programming marketplace. Clearly, the Big 4 networks no longer remain the only viable option for prime time programming necessitating intrusive regulation of their programming schedule.[208]

The arguments of both the Coalition and the Writers Guild that consolidation in the programming industry has caused a lack of diversity in the network prime time schedule are entirely undermined by the results of Study #5. In fact, Study #5 concluded that "[a]s the

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205 *See* Coalition Comments, at 24, 6.

206 Not only do cable ratings continue to erode broadcast network ratings, but cable television has an increasing share of local advertising revenues, which, along with national advertising, is the sole source of revenue for free, over-the-air broadcast television. *See generally,* Study #12. *See also* Diane Mermigas, *Rivalry to Grow Between Stations, Cable Systems*, Electronic Media, January 6, 2003, at 4 (noting that "[c]able operators . . . have become proficient in snaring local advertising dollars . . . .").

207 *See* Coalition Comments, at 10.

208 In this regard, the Joint Commenters note that of the 11 Golden Globes awarded for television in 2003, broadcast network programming won only one. *See Golden Globe Awards 2003*, available at <http://www.hfpa.org/html/GoldenGlobeAwards-2003.html#anchor> (visited January 29, 2003).

industry has become more consolidated, program diversity has increased."[209] Study #5 also undercuts each commenter's speculation that the origin of prime time programming is somehow relevant to diversity by concluding that "it does not matter who or how many people produce programming for network prime time schedules."[210]

The Coalition and the Writers Guild attack the conclusions of Study #5, but offer only unsupported rhetoric.[211] The Caucus for Television Producers, Writers & Directors ("Caucus") likewise condemns reliance on the conclusions of Study #5. Aside from an *ad hominem* attack on the study's author, the Caucus merely rails against the analysis of program diversity. It offers, however, no substitute for the approach and conclusions of Study #5.[212]

In sum, the fin-syn rules were laid to rest many years ago – and for good reason since the primary effect of the rules was to create the very harm they were designed to address. Accordingly, any effort to resurrect these ill-considered rules – in whatever form – is doomed to failure and destined for judicial invalidation.

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209 Study #5, at 33.

210 *Id*. at 36.

211 *See* Coalition Comments, at 30; Writers Guild Comments, at 15.

212 The Coalition and the Caucus also use this proceeding to attack repurposing, which they blame for decreased diversity in the prime time television schedule. *See* Coalition Comments, at 12; Caucus Comments, at 8. *See also* Cox Comments, at 27-32 (arguing that repurposing "crowd[s] out alternative programming . . . impedes competition in the programming market and reduces competition between local broadcast stations and cable channels"). Nothing about the fin-syn rules, however, would have prevented repurposing. In fact, even when the rules were in place, independent and non-independent producers alike had the opportunity to pursue repurposing rights for their programs. In any event, repurposing yields significant benefits. Both networks and independent producers can use this programming technique to extend the life of a potentially failing high quality prime time program by offsetting its high cost and enabling it to build market share and momentum. Thus, repurposing increases program diversity by saving these programs from cancellation. Repurposing also enhances program diversity by allowing fledgling cable networks to survive by cheaply increasing their audience share with current off-network programming, enabling them to build brand recognition until it becomes cost beneficial for them to develop their own programming. As a result of techniques such as repurposing, alternate programming outlets are sustained and created – ultimately benefiting the independent programming community.

CONCLUSION

The incontrovertible weight of the evidence compiled in this proceeding compels the Commission to follow a single clear course of action – elimination of its broadcast ownership regulatory regime. The strong deregulatory presumption set forth in Section 202(h) of the 1996 Act places a heavy burden squarely on the opponents of deregulation, requiring them to put forth affirmative evidence to support retention of the rules. The comments before the Commission in this proceeding, however, are wholly devoid of the type of evidence necessary to meet this burden. Where the opponents of deregulation merely offer flawed and unsubstantiated critiques of others' studies, the Joint Commenters have provided the Commission with a wealth of empirical data that leaves little doubt that all of the FCC's policy goals will be achieved through reliance on antitrust and competition laws.

In fact, what the record unmistakably shows is a modern media marketplace overflowing with a vast array of competitive outlets that employ technologies the Commission never could have imagined when it adopted its media ownership rules. For 60 years, the FCC has attempted to impose an atomistic structure on the broadcast industry, singling it out for efficiency-reducing ownership limits even as broadcasters must compete against an ever-increasing phalanx of unregulated competitors. The time has now come for the Commission to confront the tremendous changes that have taken place in the modern media landscape and to unshackle broadcasters from an outmoded, discriminatory and anticompetitive ownership regime.

Both evidence and logic overwhelmingly support what the 1996 Act absolutely compels: the Commission must repeal all of the existing ownership rules in their entirety.

Respectfully submitted,

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